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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term 1997

JESUS RODRIGUEZ, MARIA RODRIGUEZ, JESUS REYES, YOLANDA REYES,

Petitioners,

v.

ANTHONY SABATINO, SONJA SOSA, BORG WARNER-PROTECTIVE SERVICES CORPORATION, doing business as WELLS FARGO GUARD SERVICES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

DARRELL K. CHERRY
Counsel of Record
Deutsch, Kerrigan & Stiles, L.L.P.
755 Magazine Street
New Orleans, Louisiana 70130
(504) 581-5141
Counsel for Petitioners

59 pp

QUESTION PRESENTED FOR REVIEW

WHERE STATE LAW IS UNSETTLED, THERE IS NO CONTROLLING CASE ON POINT AND IT IS NOT CLEAR THAT A CAUSE OF ACTION WOULD BE REJECTED BY THE STATE COURTS, MAY THE FEDERAL COURTS PROPERLY EXERCISE SUBJECT MATTER JURISDICTION OVER NON-DIVERSE STATE LAW CLAIMS UNDER THE FRAUDULENT JOINDER DOCTRINE BY APPLYING THE STANDARDS APPROPRIATE FOR A RULE 56 SUMMARY JUDGMENT?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is set forth in Appendix A. The decision of the United States District Court for the Southern District of Texas is contained in Appendix B, which incorporates the transcript of the hearing on the motion to remand, at Appendix C. The order denying rehearing is found at Appendix D. The dissent of Judge Dennis on the related mandamus petition is found at Appendix E.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. §1254. The United States Court of Appeals for the Fifth Circuit issued its Opinion in this case on September 3, 1997. Rehearing was timely sought and the order denying rehearing was issued on October 10, 1997. Appendix D. This Petition is timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS

1. 28 U.S.C. §1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

2. 28 U.S.C. §1332(a) provides as follows:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between -
>
> (1) citizens of different states
>
> * * * *

STATEMENT OF THE CASE

Plaintiffs, Texas residents, filed this wrongful death suit in Hidalgo County on December 13, 1994. On January 10, 1995, defendant Borg Warner removed the suit to the U.S. Southern District of Texas, alleging fraudulent joinder of defendant, Sonja Sosa, a Texas resident. Plaintiffs timely moved to remand on January 31, 1995, pointing out that any reasonable security guard would foresee the extreme danger to driving-age minors posed by her allowing them to illegally consume alcohol on city premises, in violation not only of state law but also city rules specifically forbidding drinking in or around the areas of Sosa's patrol. Plaintiffs further argued that Sosa had admitted contractual duties to report or prevent criminal behavior affecting the patrons, all of whom had arrived by car or truck and obviously would be leaving the same way. Sosa, the City's contracted-for security guard, failed to exercise her duties owed to the patrons of the party she was guarding by allowing 16-year-old Francisco Sanchez to consume intoxicating beverages without taking any steps to report his and the other rampant teenage drinking or to stop it herself. Plaintiffs' security expert established gross negligence in failing to stop or report the behavior. Rec. 93. Plaintiffs further established Sosa's omissions could reasonably be a material cause of the deaths of plaintiffs' 16-year-old children, given the

foreseeability of death in mixing alcohol, 16-year-olds and driving. Sosa being non-diverse, removal jurisdiction under 28 U.S.C. §1441 was lacking.

On July 11, 1995, the motion to remand was first addressed by the district judge who stated on the record, in an improper reversal of the legal burden, that if, by July 24, 1995, *plaintiff* could not cite a Texas case on point establishing a cause of action against a *security guard* like Sonja Sosa, fraudulent joinder would be found. Doc. 20, and Rec. III at pp. 8, 11, 14. Plaintiff noted the absence of any on-point decisions, but provided several citations of cases which, together, by clear analogy or logical extension,[1] established the possibility that a cause of action could be recognized by the Texas Supreme Court against Ms. Sosa for the alcohol related deaths of their minor children given her special contractual relationship as the guard overseeing the party on City premises and the clear foreseeability of vehicular deaths following 16-year-old drivers being allowed to consume large quantities of beer. *Id.*; Rec. at 90-102.

Mediation was attempted until November of 1995, when talks broke down and plaintiffs again reurged remand (Rec. 565). Defendants responded on December 11, 1995 with a simultaneous motion for summary judgment (Rec. at 581) and an opposition to remand which urged the trial court to treat the remand motion like a summary judgment motion. Rec. at 590. Plaintiff opposed both the summary judgment and exercise of jurisdiction. Rec.P.592-631.

On December 21, 1995, the court denied the motion to

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[1] Texas R. Civ. P. 13 specifically authorizes parties to assert causes that are "warranted by good faith argument for the extension, modification or reversal of existing law." Where there is no controlling state law on point, it cannot be said that plaintiffs fraudulently joined Sosa.

remand, having found plaintiffs had not borne the court-imposed burden of showing their right to recover against Sosa. Appendix C. On February 12, 1996, the court orally granted the motion for summary judgment based solely on its determinations of law in the remand proceeding. Rec. IV, p. 2. It was not until March 11, 1996 that defendants provided a proposed order for signature.

In the meantime, plaintiffs had sought mandamus from the Fifth Circuit which was denied on March 25, 1996, in which Judge Dennis wrote a detailed dissent analyzing Texas law and finding that defendants had utterly failed to meet the exacting *jurisdictional* threshold of "absolute certainty" that Texas law could afford no remedy against Sosa. Appendix E herein. The judgment of dismissal was ultimately granted on August 14, 1996, more than one and one-half years after the removal. Appendix B.

This appeal was noticed on August 19, 1996. Plaintiffs focused on the jurisdictional issue because the exercise of jurisdiction required a differentially higher burden of proof and the summary judgment would automatically fall with a finding of no jurisdiction. By an opinion issued on September 3, 1997 (Appendix A), the Fifth Circuit affirmed the lower court's assumption of jurisdiction, and thus the summary judgment dismissal.

Plaintiffs are the parents of Maria Reyes and Jorge Rodriguez, 16-year-olds who were tragically killed at approximately 4:20 a.m. on December 13, 1992, following a "quinceañera" party held that night at the Magnolia Center, which was owned by the City of Houston. Defendant Sonja Sosa was the sole security guard assigned to the Center under a detailed contract between the City and her employer, Wells Fargo Guard Services. Sosa's duties, at least according to Sosa, included reporting illegal activities and violations of facility rules, including a ban against drinking. Her contract obviously required

more, but defendants never saw fit to produce it to meet their burden of *disproving* a possible action with "absolute certainty."

Wells Fargo's manager admitted in a sister case involving this same accident (Rec. 56-9) that Sosa failed to properly act. The contract involved was some 30 pages long, with many listed obligations. Wells Fargo settled the other state actions with the amount protected by a secrecy agreement. Despite years of opportunity, no summary judgment was ever granted Sosa or Wells Fargo in the other state actions.

The party celebrating a 15th birthday was full of 15- and 16-year-olds who arrived by car. Sosa observed many underage teenagers illegally drinking beer, which was contrary to the rules of the facility and the criminal law. She was responsible for and actually patrolled both the building and its parking lot. Rec.P.356. Indicative of her duty to do so, Sosa twice stopped one boy from drinking, actually taking away his beer and having it thrown down the sink. Rec. 357, 384-5, 462.

Although she was "concerned" about the minors drinking (Rec. 375), and knew they also were drinking outside and in the parking lot (Rec. 378), Sosa, in violation of her admitted duty to report, failed to advise the police, her supervisor or anyone else about the blatantly illegal behavior she observed early on when something could have been done about it. Instead, Sosa did nothing to stop the 16-year-old drivers from drinking and becoming intoxicated, including 16-year-old Sanchez. Her own report documented that at 9:10 p.m. she had threatened one boy with having the cops come "to close the party down." Rec.462, 357, 380. Had she done so at 9:10 p.m., Sanchez probably would not have been able to drink there until 2:00 a.m. and still be intoxicated at 4:24 a.m.

Needless to say, the exact scope of Sosa's contractual and assigned duties was hotly contested and remained unresolved as

of the remand hearing because defendants, with the heavy burden of proof, did not want the Court to see the contract. Therefore, all inferences favorable to plaintiff and adverse to defendants were required to be imposed by the Court. Unfortunately, they were not.

Rafael Tinoco was at the party and swore in his affidavit (Rec.P.250) that (1) the drinking of beer by numerous underage kids was done in the clear view of Ms. Sosa; (2) 16-year-old Francisco Sanchez was drinking in front of Sosa, yet she did nothing to stop him; (3) Sanchez and others also drank in the parking lot during the party and stayed there until at least 2:00 a.m. drinking beer after moving the keg from the building at midnight; (4) Sanchez left the quinceañera on city property at *2:00 a.m.* in his truck with the plaintiffs' decedents and two of the other victims and went to the Mora residence; and (5) while at the Mora residence, Sanchez stayed outside and was not drinking alcohol.

At about 4:24 a.m., Sanchez, carrying the plaintiffs' two children plus three others, was speeding, lost control in a turn and slammed into an overpass abutment, killing himself and four of his five teenage passengers. Autopsy analysis showed that Sanchez had a .098% blood alcohol level.

ARGUMENT

I. WHERE STATE LAW IS UNSETTLED, THERE IS NO CONTROLLING CASE ON POINT AND IT IS NOT CLEAR THAT A CAUSE OF ACTION WOULD BE REJECTED BY THE STATE COURTS, THE FEDERAL COURTS MAY NOT EXERCISE SUBJECT MATTER JURISDICTION OVER NON-DIVERSE STATE LAW CLAIMS UNDER THE "ABSOLUTELY CERTAIN" STANDARD GOVERNING THE

FRAUDULENT JOINDER DOCTRINE.

INTRODUCTION

This Court in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941) said:

> [T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts [on removal] is one calling for the strict construction of such legislation.

In *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934), this Court also observed:

> Due regard for the rightful independence of state governments, which should activate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

More recently, this Court reiterated the long-standing rule that there is a presumption against federal jurisdiction, the proponent has a heavy burden of proving it, and jurisdiction is not to be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 1675, 128 L.Ed.2d 391 (1994).

Plaintiffs respectfully seek *certiorari* to correct the Fifth Circuit's crossing of the bright line of judicial self-restraint established by a long line of Supreme Court precedents. The question posed to this Court which it has never answered, is whether the district court may assume jurisdiction in cases where state law is ambiguous by relying on the standards for Rule 56 summary judgment (with its shifting of the burden of proof to plaintiff) rather than the correct standard for jurisdiction, *i.e.*, the

"absolutely certain" test.

In *Marathon Oil v. Ruhrgas, A.G.*, 115 F.3d 315, 318 (5th Cir. 1997), the Fifth Circuit disapproved of the analogous practice of a district court improvidently assuming subject matter jurisdiction only to dismiss on personal jurisdiction grounds, citing *Kokkonen*. Yet the Fifth Circuit in the instant case acted inimically to the well-established principles of limited jurisdiction as enunciated by this Court and which are quoted above.

This Court has implicitly held that jurisdictional evaluation of fraudulent joinder claims must be handled much differently than a summary judgment or Rule 12(b)(6) motion. The procedural differences stem from the Constitutional limits of the federal court's power to strip the state courts of their right to handle state law claims. To guard against treading on the state courts, a finding of "absolute certainty" of no cause of action against the non-diverse defendant is the *sine qua non* of fraudulent joinder jurisdiction. The joinder must be without right *and* made in bad faith. *Chesapeake & O.R. Co. v. Cokhrell*, 232 U.S. 146, 148, 34 S.Ct. 278, 280 (1914). Traversing the allegations "will not suffice" to establish fraudulent joinder." *Id.* A "colorable ground" for the claim against a non-diverse resident defeats removal jurisdiction. *Chicago Rock Island & Pacific Ry. Co. v. Schwyhart*, 227 U.S. 184, 191, 33 S.Ct. 250, 251, 57 L.Ed. 473 (1913) (Holmes, J.).

Without this predicate, the district court has no *power* to perform the *Erie* function of divining on summary judgment how the state Supreme Court would most likely resolve a *res nova* issue. Unlike summary judgment, the opponent of the fraudulent joinder claim has no burden of proof, all disputes are resolved in favor of plaintiffs, all inferences are accorded to plaintiffs, and because certainty is required, all ambiguities or uncertainties of state law end the inquiry and require remand. *E.g., B., Inc. v. Miller Brewing Co.*, 663 F.2d 544, 550 (5th Cir. 1981).

A. THE DISTRICT COURT, FACED WITH UNCLEAR AND EVOLVING STATE LAW APPLICABLE TO PLAINTIFFS' ACTION AGAINST SECURITY GUARD SOSA, IMPROPERLY EXERCISED DIVERSITY JURISDICTION BY RESORTING TO RULE 56 STANDARDS FOR SUMMARY JUDGMENT.

The standard applicable for resolving fraudulent joinder claims is well established. The *proponent* for federal diversity jurisdiction has the "heavy burden" of showing by "clear and convincing" evidence that there is "*no possibility*" that plaintiff is afforded any relief against the in-state defendant by the state courts, or that there was outright fraud in the pleading.[2] *Kokkonen*, 511 U.S. at 377, 114 S.Ct. at 1675; *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed 702 (1951). That is not all. All ambiguities in the *law*, as well as all factual inferences, are to be resolved in favor of the party suggesting the absence of diversity jurisdiction. *E.g., Bobby Jones Garden Apartments v. Suleski,* 391 F.2d 172, 177 (5th Cir. 1968).

Judge Dennis of the Fifth Circuit eloquently exposed the constitutional improprieties in what the trial court did here, based on heretofore bedrock principles explained in a succession of cases, including *B., Inc.*, 663 F.2d 545 (5th Cir. 1981) and *Bobby Jones*, 391 F.2d 172, 174-77 (5th Cir. 1968). *See* mandamus dissent at Appendix C. Under these precedents, there could be no subject matter jurisdiction here because Ms. Sonja Sosa, one of the principal actors causing the five deaths in this sad event, was a Texas resident, and the defendants failed to bear the incredibly hard burden of showing the impossibility of a cause of action

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[2] Defendants have they ever suggested fraud in the pleading of a claim against lgoSosa, as she is *the* actor whose negligence gives rise to all of the claims against all of the defendants.

being recognized against Sosa.

The district court erred in accepting defendants' express invitation to treat this jurisdictional matter as if it were a summary judgment. Rec.81, 580. The defendants below were not required to and could not in fact prove that it was "absolutely certain" that plaintiffs could not recover against Sosa under Texas law. They could not because there was no state authority on point, and law was developing that recognized enhanced duties flowing from special relationships, contractual relationships and special duties owed by adults to minors concerning illegal alcohol use and driving. Under a view of the facts most favorable to plaintiffs, there was a clear *possibility*, if not a probability, that a Texas court *would* find Sosa at least had the duty to report the illegal behavior, if not stop it herself.

The facts, contested or incomplete in several areas material to the legal issue of duty, themselves made it impossible to establish the impossibility of a cause of action. Bad faith "fraud" in the supposed fraudulent joinder as required by this Court could not be found nor did the lower courts try to do so. The impossibility of the fraudulent joinder standard being met is particularly apparent once all *inferences* are accorded plaintiffs rather than defendants. As a close reading of the Fifth Circuit Panel's opinion discloses, the Panel accepted the defendants' version of the facts with no mention, much less the required acceptance of the truth of the countervailing facts contained in plaintiffs' affidavits.

Instead, the Fifth Circuit misapplied the established standards and *did* resolve facts in order to deny any duty was owed by Sosa to even report to the police or her superior the blatantly illegal and dangerous beer drinking by 16-year-old drivers like Sanchez. Ultimately, the Fifth Circuit decided, based on the wrong assumed facts, that Sosa could never be found to owe *any* duty to her children patrons, even though she was there

and being paid under a contract to enforce rules and enforce order and protection to the patrons.

With all respect, the Fifth Circuit missed the operative facts and misperceived the signs from Texas courts, that, under the facts favorable to plaintiff, a duty arguably or conceivably could be imposed by law on Sosa to stop or at least *report* Sanchez's drinking; particularly given the clear foreseeability of vehicular accidents injuring patrons leaving as passengers of 16-year-old intoxicated drivers. Facts were there to establish a special relationship of responsibility and guardianship between Sosa and her patrons which would allow *at least* the *possibility* of a recognition of duty and foreseeability. Yet these facts were ignored or resolved against plaintiffs because the court blurred the line between the much higher jurisdictional standard and the lower Rule 56 standard. All of this led to the erroneous affirmance of jurisdiction and the concomitant usurpation of power.

The Fifth Circuit failed to apply the extremely high burden that must be met to establish fraudulent joinder. Crucial to the proper *application* of these general standards are (1) the identification of all facts and inferences favorable to the plaintiff; (2) identification and analysis of all state legal theories which might afford a recovery *and* giving *plaintiffs* the benefit of any ambiguities in the law; and (3) good faith arguments against law contrary to plaintiffs *if* such law existed, which was not the case here. Unfortunately, the Panel failed to do these essential tasks. It erred in assaying the facts and the law against a backdrop of hotly contested facts and in the absence of a dispositive Texas precedent that could remove all ambiguities as to whether a cause of action might be recognized. Failing to apply the rules is the same as repudiating them.

It is important to begin the analysis with a reminder that there is a larger context to this appeal. This Court has the delicate

and difficult job of guarding the button that starts or stops the federal monolith from gobbling up powers reserved to the states by the Constitution and Congress. If this Honorable Court refuses review, the constitutional gatekeeping of the limited jurisdiction of the federal courts will have broken down. The circuit courts need guidance on this issue from this Court.

The reevaluation of the Fifth Circuit's affirmance herein is thus of exceptional importance not only because of its general constitutional implications, but also because of the practical significant of the signals it sends to the numerous district courts. The Fifth Circuit opinion, in its application, demonstrates vividly that past authority is really not as strict as Judge Holmes stated in *Chicago, Rock Island*, 227 U.S. 184, 33 S.Ct. 250 (1913). Left untouched, the Fifth Circuit's opinion will be seen as allowing the determination of subject matter jurisdiction under the "absolute certainty" test application really is no different than entertaining a Rule 12(b)(6) or Rule 56 summary judgment motion.

Clarity on the subject uniquely provided by this Honorable Court is desperately needed now, so that the Fifth Circuit can again be aligned with the Supreme Court and its own long line of jurisprudence recognizing a different and much more stringent standard of proof required before the presence of a non-diverse party defendant can be ignored. The issue will doubtlessly recur again and again absent such clarification by this Court.

THE SPECIFICS

Turning to the specifics of the Fifth Circuit's opinion as we must, what is striking in its absence is any mention or recognition of countervailing facts established by plaintiffs in the district court. Instead, the opinion's rendition of the facts is incomplete and comes from the *defendant's* version alone. Moreover, the opinion gives 100% favorable credibility and inferences to defendants, while giving plaintiffs none. The

operative facts assumed to be true in the opinion are summarized below, each followed by brief references to contrary facts found in the record:

1. Sosa, under a contract with the City, patrolled the building and parking lot only to "prevent vandalism" and "thwart auto theft." Op. at 5089. [Note that even if it were true, this establishes that Sosa *did* have duties going far beyond those of a bystander, including a duty to enforce laws against criminal behavior such as underaged drinking. The reference to vehicle theft comes from Sosa's obviously partisan testimony, but even at that she acknowledges duties of reporting crimes or rules violations involving patrons using the Center property. As a licensed security guard with demonstrated powers of control over the teenage patrons (having admittedly taken away the beer of one 16-year-old), Sosa owed *some* duty to the 15- and 16 year-old occupants of those cars given the patent foreseeability of their deaths or injury after driving away having drunk intoxicating beverages illegally for hours in front of Sosa. Ultimately, the defendants' failure to produce the contract *precludes* a finding by "absolute certainty" that the contract limited Sosa's duties.]

2. She did not "card" people or "monitor the serving of alcohol." *Id.* [This "fact," if true, made no difference as City rules prohibited *any* drinking on the premises As Sosa demonstrated, it is nonetheless easy enough to tell from the *face* of a 16-year-old drinking beer that he isn't 21].

3. There was "some underaged drinking." *Id.* [Tinoco established that underaged drinking was rampant. Most important, Sosa admits knowing about it.]

4. Sanchez, whose impaired driving that night killed plaintiffs' children, only consumed "two cups of beer" that Mario Mora had "sneaked" to him at the party. *Id.* [This totally ignores

Tinoco's affidavit, R.250, that Sanchez was openly drinking out of large sports cups all during the party, and in the city parking lot thereafter, in full view of Sosa.]

5. Sanchez had only been drinking "a little" at the quinceañera. Op. at 5091. [Contradicted by witness Tinoco, this ultimately is an issue of fact inappropriately resolved in defendants' favor.]

6. Sanchez left the party promptly at midnight when the center was locked up. *Id.* [Patently false. Tinoco established without contradiction that Sanchez stayed behind, drinking beer in the city parking lot until *2:00 a.m.* R.250. Any inferences as to causation is a fact issue.]

7. Sanchez went at midnight to the Mora residence where he stayed for two hours drinking. [Ignores Tinoco's affidavit that Sanchez did not drink at the Mora's residence. *Id.*]

8. "The accident did not occur until almost four-and-a-half hours after Sanchez left the quinceanera." Op. at 5091. [The inference taken by the Panel was that Sanchez's drinking in the presence of Sosa was not the proximate cause of the accident. This wholly ignores the possibility that the residual intoxication resulted from Sanchez's drinking *until 2:00 a.m.* at the quinceañera. Sanchez's autopsy showed a .098% blood alcohol level. Ultimately, causation was a fact question for the state jury, and not one for the federal courts.]

9. At the accident scene, the truck was observed to have beer cans and "a strong odor of alcohol." *Id.* [Inferences are unclear. The odor could have come from beer served in open cups at the quinceañera, or from his passengers. Clearly a fact question, inferences in favor of plaintiffs should have been assumed, but instead, were omitted.]

10. Mora was charged by the Alcohol Board with illegally serving minors alcohol, but not Sosa or her employer. Op. at 5090. [The inference is that only persons charged by the Texas Alcohol Board can be sued — a legally infirm position.]

Review of the factual basis of the affirmance is essential because the lack of duty and proximate cause found by the Fifth Circuit — the legal issues — depended upon the above facts erroneously assumed by the Court to be uncontradicted. Quoting from *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987), the Panel noted in the opinion:

> "Duty is the threshold inquiry . . .," and the "foremost and dominant consideration" in determining whether a duty exists is the "foreseeability of the risk."

[Slip Op. at 5091.]

Defendants had the burden of proving by "absolute certainty" (1) that it was totally unforeseeable for any reasonable person to see that 16 year-olds drinking and driving would have accidents, and (2) the law in Texas did not then and never could recognize a duty owed by an adult professional security guard to the children she was guarding while on duty, to stop or at least report criminal and inherently dangerous activities. Such a finding would have to first rely on facts that are truly uncontested and unambiguous (none of which appear to exist here), or otherwise on *plaintiffs'* asserted facts, since all fact questions and inferences must be resolved in *plaintiffs'* favor. Moreover, the law must be crystal clear as well, as all ambiguities or uncertainties must be resolved against jurisdiction.

Simply put, defendants never cleared the high hurdle, yet the Fifth Circuit allowed a "pass" anyway. Plaintiffs *did* provide contrary evidence and at every turn there were facts and

inferences favorable to plaintiff that contradicted virtually every fact the opinion relied on in rendering its legal conclusion of "absolute certainty" that there was insufficient foreseeability, duty and proximate cause. The ruling is a product of the lack of clarity between the concept of jurisdiction and that of summary judgment.

Sosa never denied knowing that underage drinking at the party was rampant and that Sanchez was one of the offenders. She admitted in her deposition that she was "concerned" about it (R.375) but did nothing by way of either *reporting it to the police*, her supervisor or any city employee. On one occasion, at 9:10 p.m., Sosa took away one kid's beer and *threatened* to call the police and have them "shut the party down." R.357, 380. She even noted this in her contemporaneous report. R.380. Her presence was noted and relied on by the parents. Rec. 614. Texas recognizes that "one who undertakes an affirmative course of action affecting the interest of others is regarded as assuming a duty to act, and must do so with reasonable care." *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1990); *Fort Bend City Drainage v. Sbrusch*, 818 S.W.2d 392, 396 (Tex. 1991) (applying Restatement 2d of Torts §324A). Sosa took it upon herself at the party to stop underage drinking, yet did a pitiful job of it. Rec. 93. Jose Sanchez in his affidavit testified that as a parent of teenage party goers, he relied on Sosa to enforce the underage drinking laws. Rec. 614. Restatement 2d §324A(3) specifically recognizes such reliance as a grounds for recognizing a duty. The *possibility* of a cause of action under these circumstances could not be ruled out with absolute certainty.

A special relationship also existed between Sosa and the party guests as a result of the contract between defendant Wells Fargo and the City of Houston. The Texas Supreme Court has recognized that:

> Accompanying every contract is a common-law duty to perform with care, skill, reasonable experience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract.

Southwestern Bell Tel. Co. v. Delaney, 809 S.W.2d 493, 494 (Tex. 1991).

As for her contract, we know one existed, but defendants, who had the high burden of proof, *never produced it.* The inference that must be applied by law in the context of the jurisdictional issue, is that the contents were *harmful* to the defendants and the contract *did* establish a duty to stop crimes affecting the party patrons. Defendants committed a fatal mistake by holding the document, as they could not possibly negate "with absolute certainty" the existence of broader "security" duties owed to patrons *without* producing it. While the Texas Supreme Court has not had the opportunity of ruling on a case like this one (an irony, as *this* case should be the vehicle for the state courts to provide the definitive answer), other states have found a duty. *E.g., Kramer v. Continental Cas. Co.*, 641 So.2d 557 (La.App. 3rd Cir. 1994) (guard owed duty to teenage drinker to prevent his underaged drinking).

The analysis contained in the opinion illustrates the danger of failing to heed the distinction between a summary judgment and evaluating removal jurisdiction. The lower court and the Fifth Circuit should have, but did not, stop the analysis and remand the case once it became apparent that Texas law on the subject was unclear or ambiguous.

Here, there was no controlling state precedent.[3] *Id.* Sosa was not a social host serving adults. Her relationship with the *minor* patrons of that party was one of security. Inferences, if not outright admissions, established that Sosa at least owed a duty of reporting if not stopping crimes affecting those patrons. She was not a bystander, so the opinion's reliance on a general rule applicable only to those with no relationship to a victim is not relevant, much less dispositive. Op. at 5091. Sosa individually, and her employer, vicariously, are liable for any breaches of duty. *E.g., McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 904 (Tex. 1980).

By way of example, if a teen had pulled a knife and was threatening patrons of the party in front of Sosa, can it really be said she could simply look away and have no duty to call police or intervene? 16-year-olds getting into car wrecks after drinking at a location to which most had driven posed just as much danger as an assault, and drinking was something Sosa more easily could have prevented.

The district court, as well as the Fifth Circuit, did have indications from the Texas Supreme Court that when minors and alcohol are involved, foreseeability of harm is as undeniable as that "resulting from setting loose a live rattlesnake in a shopping mall." *El Chico*, 732 S.W.2d at 311.

El Chico recognized a common law duty owed by providers of alcohol to *adults* who were intoxicated. When the legislature subsequently enacted a dramshop act to protect sellers

---

[3] Certainly *Crider v. U.S.*, 885 F.2d 294 (5th Cir. 1989) was not controlling, as was represented by defendants to the district court and the Fifth Circuit. *Crider* involved a park ranger found not to owe a duty to incarcerate an *adult* driver appearing intoxicated, where the driver was involved in an accident 10 hours later.

of alcohol, it not only excluded from that protection serving visibly intoxicated adults, it also excluded *any* limitation of liability arising from the provision of liquor to minors 18 and under. *Id.*

While this is not a dramshop case, the lesson to be learned from such cases is the clear portent that duties may be imposed by the Texas high court on those adults with any supervisory or commercial relationship in whose presence underage drinking is allowed to flourish. Thus *Ryan v. Friesenhahn*, 911 S.W.2d 113, 118 (Tex. App. - San Antonio 1995 - *writ granted*) specifically found liability against a social host of teenagers, noting:

> when the party is for the purpose of engaging in dangerous and illicit activity, the consumption of alcohol by minors, adults certainly have a great duty of care.

The jurisdictional issue here cannot hinge on whether someone else, *e.g.*, Sanchez, is also responsible for the deaths. Texas, like other states, recognizes the concept of multiple concurring causes whereby *each* person who is a cause of the damage can be held responsible, even if there are other causes. *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 459 (Tex. 1992).

Thus, for example, a security guard was found liable in *Beryl v. D&L Security Services & Investigations, Inc.*, 876 S.W.2d 179, 188 (Tex. App. - Dallas 1994, *writ denied)*, when he negligently chased a shoplifter, who then injured a patron of the store. Indicative of the expanding and evolving nature of Texas law on duty, the Court said:

> The common law of tort, including the concept of duty, must evolve in light of the changing conditions and circumstances of society . . . .

> Changing social conditions lead constantly to the recognition of new duties. No better statement can be made, that the courts will find a duty where in general, reasonable men would recognize it and agree that it exists . . . .

Beryl, 876 S.W.2d 188.

B. BY USURPING JURISDICTION OVER A CASE AND CONTROVERSY CONGRESS HAS EXPRESSLY EXCLUDED FROM THE JURISDICTION OF FEDERAL COURTS, FEDERALISM IS PERMANENTLY DAMAGED UNLESS RECTIFIED BY REVERSAL.

The Fifth Circuit went off course at the outset when the wrong facts were assumed for the purpose of legal analysis, which error was compounded by the court's confusing of the Rule 56 standards with those higher standards governing fraudulent joinder.

Plaintiffs' facts were not given the requisite deference and all possible inferences favorable to plaintiffs and against defendants were not accorded. Moreover, the opinion misperceived the possibility of Texas recognizing a cause of action against Sosa and her employer given the absence of adverse controlling precedent, the contractual duties that must be inferred from the missing contract, the evolving state law recognizing greater duties owed minors and the high foreseeability of vehicular deaths flowing from underage drinking by kids known to be driving to and from the venue.

At the very least, a Texas court *possibly* could find a duty by Sosa to have reported Sanchez and the others to police or city officials, any of whom would have nipped the drinking in the bud. Sanchez, who had been drinking on city property for some six hours, until 2:00 a.m., at least *arguably* would not have been driving impaired at 4:24 a.m. and the accident would have been averted. This *possibility* was enough to require remand. While a fact finder might ultimately disagree, and plaintiffs might lose on the merits, this is not the test for fraudulent joinder jurisdiction. Resolution of the facts and ambiguities of Texas law were and are reserved by Congress for the state court system.

CONCLUSION

Taking another and closer look at the record, combined with the actual application of the recognized principles, demonstrates clear error in the original decision on an issue extremely important to the constitutional division powers between the federal and state governments. *Certiorari* is needed here to clarify the proposition that jurisdictional matters must not give way to the lesser standards applicable to summary judgments.

Respectfully submitted,

DARRELL K. CHERRY (#4036)
Deutsch, Kerrigan & Stiles, L.L.P.
755 Magazine Street
New Orleans, LA 70130
Telephone: (504) 581-5141
Telefax: (504) 566-1201

Attorneys for Petitioners
Jesus Rodriguez, Maria Rodriguez,
Jesus Reyes and Yolanda Reyes

Exhibit A

United States Court of Appeals,
Fifth Circuit.
No. 96-40883.

Jesus RODRIGUEZ; Maria Rodriguez; Jesus Reyes; Yolanda Reyes,
Plaintiffs-Appellants,

v.

Anthony SABATINO; Sonja Sosa; Borg-Warner Protective Services Corporation doing business as Wells Fargo Guard Services,
Defendants-Appellees.

Sept. 3, 1997.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

The district court denied the plaintiffs' motion to remand because it determined that they had fraudulently joined two defendants. Hence, it had diversity jurisdiction under 28 U.S.C. § 1332(a). Subsequently, the district court

granted the defendants' summary judgment motion, dismissing the plaintiffs' complaint. On appeal, the plaintiffs contend that the district court lacked subject matter jurisdiction over their case. We affirm.

I

On December 12, 1992, Maria Reyes ("Maria"), Jorge Rodriguez ("Jorge"), and Francisco Sanchez went to a quincinera hosted by Maria and Mario Mora at the Magnolia Civic Center, a property owned by the City of Houston. The quincinera lasted from about 8:00 p.m. until 12:00 a.m. Borg-Warner Protective Services, Inc. d/b/a Wells Fargo Guard Services ("Wells Fargo") provided security for the event pursuant to a contract between Wells Fargo and the City of Houston. Wells Fargo assigned one of its employees, Sonia Sosa, a citizen of Texas, to work as a security guard at the party. As part of her duties, Sosa patrolled the building to prevent vandalism and watched over the parking lot to thwart automobile thefts. She did not check the identification of anyone consuming alcohol at the party or otherwise monitor the serving of alcohol there.

There was apparently some underage drinking at the quincinera. Mario Mora admitted, for instance, that he "sneaked" two cups of beer to Sanchez around 10:30 p.m. At midnight, the party moved over to the Mora residence. Sanchez, Jorge, and others consumed alcohol there with Mario Mora.

After spending a couple of hours at the Mora residence, Sanchez, Jorge, Maria, Angelica Aguilar, Oscar J. Medina, and Martha Perez left in Sanchez's pickup truck.

At approximately 4:24 a.m., Sanchez's truck jumped the curb, spun up an embankment, and smashed into the underside of a highway overpass. Everyone was killed, except for Perez. Police officers at the scene found beer cans in the car and noticed that the vehicle emitted a strong odor of alcohol.

The Texas Alcoholic Beverage Commission ("TABC") investigated the accident. It filed charges against Mario Mora for making alcohol available to minors but not against Sosa, Wells Fargo, or the City of Houston.

After the accident, Jorge and Maria's respective parents, citizens of Texas, filed a complaint in state court against Wells Fargo, Sosa, and, Sosa's supervisor, Anthony Sabatino,[1] alleging, among other things, that all three were citizens of Texas. The defendants removed the case to federal district court, and then the plaintiffs moved to remand.

The district court determined that Wells Fargo was not a citizen of Texas, and that Sabatino and Sosa had been fraudulently joined. Because complete diversity existed, the court denied the plaintiffs' motion to remand. The plaintiffs then filed a writ of mandamus in this court, arguing that the district court erred. We denied the writ.

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[1] Apparently, Sabatino worked in Wells Fargo's Metuchen, New Jersey office at the time of the accident. In May 1994--a year and a half after the accident--Wells Fargo transferred him to its Houston office.

The plaintiffs do not discuss Sabatino at all in their brief. Clearly, he has nothing to do with this case. Thus, we will limit our analysis in this opinion to the issue of whether the plaintiffs fraudulently joined Sosa.

Subsequently, the district court granted the defendants' motion for summary judgment, dismissing the plaintiffs' complaint.

On appeal, the plaintiffs contend that the district court erred in determining that they fraudulently joined Sosa and thus in concluding that it had subject matter jurisdiction under 28 U.S.C. § 1332(a).

II

We review de novo a denial of remand to state court. Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd., 99 F.3d 746, 751 (5th Cir.1996). A party invoking the removal jurisdiction of the federal courts bears a heavy burden. Id. To prove that non-diverse parties have been fraudulently joined in order to defeat diversity, the removing party must demonstrate either "outright fraud in the plaintiff's recitation of jurisdictional facts," Burden v. General Dynamics Corp., 60 F.3d 213, 217 (5th Cir.1995), or that "there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court." Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 259 (5th Cir.1995). The defendants do not allege outright fraud, so only the second rule is at issue here. In this regard, we "evaluate all of the factual allegations in the plaintiff's state court pleadings in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff" and "examine relevant state law and resolve all uncertainties in favor of the nonremoving party." Green v. Amerada Hess Corp., 707 F.2d 201, 205-06 (5th Cir.1983), cert. denied, 464 U.S. 1039, 104 S.Ct. 701, 79 L.Ed.2d 166 (1984).

In evaluating a claim of fraudulent joinder, we do not determine whether the plaintiff will actually or even probably prevail on the merits of the claim, but look only for a possibility that the plaintiff may do so. Burden, 60 F.3d at 216. The question, then, is simply whether the defendant can show that no possibility exists that the plaintiffs have stated a claim against Sosa.

The Texas Supreme Court has stated that common-law negligence "consists of three essential elements--a legal duty owed by one person to another, a breach of that duty, and damages proximately resulting from the breach." El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex.1987). "Duty is the threshold inquiry ...," and the "foremost and dominant consideration" in determining whether a duty exists is the "foreseeability of the risk." Id. An alcoholic beverage licensee, for instance, has a duty not to serve alcohol to an intoxicated person whom the licensee knows will probably drive a car. Id. Also, a person has a duty to take affirmative action to control or avoid increasing the danger from another's conduct which the actor has at least partially created. Id. The general rule, though, is that a person is under no duty to control the conduct of another, even if he has the practical ability to exercise such control. Otis Engineering Corp. v. Clark, 668 S.W.2d 307, 309 (Tex.1983).

In this case, the evidence indicates that Sanchez had been drinking a little at the quincinera and that Mario Mora sneaked him two beers there. In contrast, Sosa was not serving alcohol or even checking identification. While Sosa testified that she observed underage drinking and stopped at least one minor from drinking, there is no

indication that her job required her to prevent such conduct.

In addition, we do not think that the evidence demonstrates that Sosa even partially increased the danger that Sanchez would crash his truck, killing himself and four others. First, Mario Mora has admitted sneaking Sanchez two beers. In fact, the TABC actually charged Mora with violating § 106.06 of the Texas Alcoholic Beverage Code by giving beers to minors. Conversely, Sosa did nothing to facilitate underage drinking. Second, the accident did not occur until almost four-and-a-half hours after Sanchez left the quincinera, and there is proof that Sanchez was drinking at the Mora residence during at least part of this period. Given the fact that Sosa locked up the Magnolia Civic Center shortly after midnight, effectively ending the quincinera, we do not think that she did anything or failed to do anything that contributed to the 4:24 a.m. crash. Sosa had no common-law or other duty to Maria or Jorge, the exercise of which would have prevented this tragedy.

Because Sosa lacked a duty to Maria or Jorge, absolutely no possibility exists that the plaintiffs can state a claim against Sosa. Therefore, the defendants have shown that the plaintiffs fraudulently joined Sosa. Accordingly, there is complete diversity in this case and the district court had subject matter jurisdiction under 28 U.S.C. § 1332(a).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

Jesus RODRIGUEZ; Maria Rodriguez; Jesus Reyes; Yolanda Reyes,

v.

Anthony SABATINO; Sonja Sosa; Borg-Warner Protective Services Corporation doing business as Wells Fargo Guard Services,

CIVIL ACTION NO. M-95-101

ORDER OF DISMISSAL

The Court notes that, for the reasons stated on the record on July 11, 1995, December 21, 1995 and May 10, 1996 at the hearings held on Plaintiff's motions to remand and for reconsideration, it has ruled that Defendants Anthony Sabtino and Sonia Sosa were fraudulently joined. After considering Defendant Borg-Warner Protective Services, Inc., d/b/a Wells Fargo Guard Services' Motion for Summary Judgment, the pleadings on file, the arguments of counsel, and the applicable law, the Court on February 12, 1996 for the reasons stated on

the record found said motion should be in all things granted. It is, therefore,

ORDERED, ADJUDGED, and DECREED that Defendants Anthony Sabatino, Sonia Sosa, and Borg-Warner Protective Services, Inc, d/b/a Wells Fargo Guard Services' Motion for Summary Judgment is GRANTED and that this case is hereby DISMISSED with prejudice.

The Clerk shall send a copy of this Order to counsel for the parties.

Exhibit C

STATUS CONFERENCE

**BEFORE THE HON. RICARDO K. HINOJOSA,
UNITED STATES DISTRICT JUDGE**

APPEARANCES:

For the Plaintiff: SEE NEXT PAGE

For the Defendant: SEE NEXT PAGE

Court Recorder: Irma A. Soto
PREPARED BY:

JUDICIAL TRANSCRIBERS OF TEXAS, INC.
7035 *West* Tidwell
Building J, Suite 109
Houston, Texas 17092
(713) 462-6434

**proceedings recorded by electronic sound recording,
transcript transcription produced by transcript service.**

appearances

For the Plaintiff: Jamison & Associates
BRIAN TRUETT AKIN
1001 Texas Ave.
Suite 1400

Houston, Texas 77002

For the Defendants: Adams & Duesler
THOMAS W. DUESLER
550 Fannin
Suite 530
Beaumont, Texas 77701

Brin & Brin
STEVEN MARK VIDAURRI
118 E. Cano
Edinburg, Texas 78539

THE COURT: Next case is Civil Action No. M-95-101, *Jesus Rodriguez and others versus Anthony Sabatino* and *others.*

MR. VIDAURRI: Your Honor, Steven Vidaurri here on behalf of the Defendants.

THE COURT: Do we have anybody here for the Plaintiffs?

MR VIDAURRI: It doesn't seem, Your Honor, that there *is.*

THE COURT; Well, it was set for 4:30, as well as the other one. I need to get the files here anyway. I'm pretty familiar with this case. So I *was* going to take a break to get those two files that are set for 4:30. Let me go get them.

MR. VIDAURRI: That's fine Your Honor.

THE COURT: Okay.

(Recess from 4.31 p.m. to 4:52 p.m.)

THE COURT: Please be seated. Civil Action No. M-95-101, *Jesus Rodriguez and others versus Anthony Sabatino and others.*

MR. AKIN: Good afternoon Your Honor. Bryan Akin for the Plaintiffs.

MR. VIDAURRI: Steven Vidaurri and ToM Duesle here on behalf of Defendants.

THE COURT: Okay, we're on the motion to remand. This case didn't settle, I take it?

MR. AKIN: It did not, Judge.

THE COURT:Okay. The motion to remand with regards to the fraudulent joinder of the security guard here, Ms. Sosa, is that correct?

MR. AKIN: Yes, sir.

THE COURT: Is there anything else that needs to be added by way of oral argument to what's on file here?

MR. AKIN: Judge, we don't have anything, any additional argument.

THE COURT: Okay. The Court's going to find that there is no cause of action that can be asserted with regards to Ms. Sosa. I could find no *Texas* law that would indicate that an individual in her position, with her

employment and what she was doing at this particular location, could be held liable or owe a duty to the plaintiffs here, or could be held liable with regards to the plaintiffs here.

The only other motion that you had urged as a motion for summary judgment. Did you want -- you didn't want to reurge your motion to transfer venue here?

MR. DUESLER: No, sir. The motion for summary judgment was, if Sony was not liable, then of course the company can't be either.

THE COURT: Did you want to further respond to that? I know that this is a reurging after the breakdown of the mediation here. Did you want to respond in any way further to that? I'm mean I'd be glad to give you time to go ahead and respond further to that if you'd like to.

MR. AKIN: Judge, I would like to. We just got that motion for summary judgment last Wednesday, I believe.

THE COURT: I think they're basically reurging their well, it is a new motion, right?

MR. AKIN: It's a new motion Judge.

THE COURT: You had not --

MR. DUESLER: It's a new motion which *simply restates* the old grounds. If the security guard can't be liable, then of course the company can't under *respondeat superior.*

THE COURT: Right. He filed it on December 11 th. It's not ripe yet. I'll go ahead and give you -- I will deny the motion to remand here, and then I will find that there is no cause of action that can be asserted with regards to Ms Sosa here.

Your answer due date is December 31st. At the present time, with regards to the motion for summary judgment. Did you need a little bit more time than that?

MR. AKIN: I would appreciate it, Judge.

THE COURT: Okay. I will give you until January the 15th.

MR. AKIN: Thank you, Judge.

THE COURT: And we'll have a hearing on this motion.

(Court and Clerk confer)

THE COURT: Oh, it will be January the 16th because the 15th is a holiday with regards to filing something else here.

We'll continue with this hearing on February the 12th, at 4:30 in the afternoon. If you all don't have anything else, you all can be excused. Thank you all very much.

MR. AKIN: Thank you, Your Honor.

MR. VIDAURRI: Thank you, Your Honor.

MR. AKIN: I apologize to the Court for being late. Held up over the McAllen Airport.

MR. DUESLER: some very serious weather. Yes, sir.

Thank you, Your Honor.

MR. AKIN: May we be excused?

THE COURT: Is this a statewide problem or -

MR. AKIN: We didn't have any trouble getting out of Houston. We both left on the the same flight obviously.

THE COURT: Well, I hope you all have a -- won't have much trouble getting back out of here.

MR. DUESLER: You're looking at my overnight bag.

(Laughter)

THE COURT: Well, thank you all very much.

MR. DUESLER: Thank you, Judge.

MR.. VIDAURRI; Thank you, Judge.

(This proceeding adjourned at 4:56 p.m.)

Exhibit D

United States Court of Appeals,

Fifth Circuit.
No. 96-40883.

Jesus RODRIGUEZ; Maria Rodriguez; Jesus Reyes; Yolanda Reyes,
Plaintiffs-Appellants,

v.

Anthony SABATINO; Sonja Sosa; Borg-Warner Protective Services Corporation doing business as Wells Fargo Guard Services,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas, McAllen

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 9/3/97, 5 Cir., ____ I ____ F3d ____

Before JONES, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

(v) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5THCIR.R. 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

s/ United States Circuit Judge

Exhibit E

United States Court of Appeals,
Fifth Circuit.
No. 96-40883.

Jesus RODRIGUEZ; Maria Rodriguez; Jesus Reyes; Yolanda Reyes,
Petitioners

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas, McAllen

Before WIENER, PARKER and DENNIS, Circuit Judges

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is denied.

James L. Dennis, dissenting:

Plaintiffs' petition this Court pursuant to 28 U.S.C. §1651 for writ of mandamus to order the district court to vacate its denial of the plaintiffs' Motion to Remand. The majority of this panel has decided to deny the plaintiffs' petition However, such action skirts one of the essential purposes of 28 U.S.C. §1651, the All Writs Statute. The United States Supreme Court has stated, "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances ...", *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-260 (1957) where ordinarily the order is non-appealable. Moore's Federal Practice, supra at 110.26. See *Securities and Exchange Commission v. Krentzman* 397 F.2d 55 (5th Cir.1968)(issuing a writ of mandamus to (1) vacate an order of the district court acting "outside [its] authority" by exercising what it thought to be discretionary power it did not possess, and (2) enter an order directing the appropriate action).

Plaintiffs filed this petition because the district court has yet to issue a fmal order for the summary judgment granted the defendants. The dominant principle of federal appellate jurisdiction is that a judgment must be final to be appealable. James Wm. Moore, Bernard J. Ward, Moore's Federal Practice, Vol 9 § 110.26. However, if inexorably applied, the final judgment rule may result in injustice. Machine-like rigidity cannot be the final goal of judicial administration. There is some need for flexibility so that, in exceptional

situations, appellate review may be had of a non-appealable order, ... such cases do arise, and the courts should be alert to respond. Moore's Federal Practice, supra at 110.26.

In this case, the district court appears to have committed clear error by placing the heavy burden of persuasion to show fraudulent joinder on the wrong party. As a result of this apparent legal error, there is "serioius doubt" whether the district court had jurisdiction to proceed further with the case. *Roche v. Evaporated Milk Ass 'n,* 319 U.S. 21, 26 (1943). The plaintiff's petition for writ of mandamus should be granted in aid of this Court's appellate jurisdiction and to confine the district court to a lawfiil exercise of its prescribed jurisdiction. I dissent from the majority's decision to deny the plaintiffs' petition for mandamus and assign reasons to support the position that the district court committed clear error by denying the plaintiffs' Motion to Remand.

In a nutshell, the district court has exceeded its jurisdiction based on an error of law, and this Court has the authority to grant a writ of mandamus to correct this legal error. Furthermore, because the defendants did not submit a proposed order to the district court, as instructed by the district court, granting summary judgment to remaining defendants, plaintiffs had no final order from which to appeal and had no other choice but to petition this Court for writ of mandamus.

The parents of five minors who were killed following a teenage party at a city civic center during which alcoholic beverages were consumed filed suit in Texas state court for wrongful death damages against

Sonja Sosa, the guard in charge of security at the party, and her employer Wells Fargo Security Services, a Pennsylvania corporation. The defendants removed the case to the federal district court, contending that Sosa, a Texas citizen, had been fraudulently joined for the sole purpose of defeating diversity jurisdiction. The federal district court overruled the plaintiffs' motion to remand the case to state court. Plaintiffs now apply to this court for relief. There is no contention that the plaintiffs are guilty of actual fraud in their pleadings. The only issue is whether the defendants have carried their heavy burden of showing that there is no possibility that the plaintiffs have a cause of action against Sonja Sosa in state court.

In determining whether a case was properly removed, this Court repeatedly has held that the district courts and this court must not "pretry" substantive factual issues in order to answer the discrete threshold question of whether the joinder of an in-state defendant is fraudulent. *Dodson V. Spiliada Maritime Corp., 951* F.2d 40, 42 (5th Cir. 1992); *Green v. Amerada Hess Corp.,* 707 F.2d. 201, 204 *(5th* Cir.1983); *B., Inc. V Miller Brewing Co.,* 663 F.2d 545, *546 (5th* Cir.1981). Even *in* a case in which "state law liability was at best uncertain, this court has held that the case was cognizable only in state courts." *B., Inc.* at *550,* n. 11.

The burden of persuasion placed upon those who cry "fraudulent joinder" is indeed a heavy one. In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is no possibility that the plaintiff would be able to establish a cause ofaction against the in-state defendant in state court; or that there has been outright fraud in the

plaintiff's pleadings of jurisdictional facts. *B., Inc. v. Miller Brewing Co.,* 663 F.2d *545,* 549 (5th Cir. 1981).

The district court (or this court in its de novo review) must evaluate all of the factual allegations of the parties contained in the pleadings, depositions and affidavits in the light most favorable to the plaintiffs resolving all contested issues of substantive fact in favor of the plaintiff. Id at 549, citing authorities. Moreover, the district court must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff. Id at 550. If there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiff, the federal court must find that the in-state defendants have been properly joined, that there is incomplete diversity, and that the case must be remanded to the state courts. Id at 550. In other words, the question is whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved. If that possibility exists, a good faith assertion of such an expectancy in a state court is not a sham and is not fraudulent in facto or in law. Id at *550* quoting from Brown, C.J., in *Bobby Jones Garden Apartments v. Suleski,* 391 F.2d 172, 177 (5th Cir.1968).

In essence, the district court, or this court on review, should conclude there is no federal jurisdiction and remand the case to the state court if either federal court "cannot predict with absolute certainty that a Texas court would summarily dismiss the causes of action asserted against [the] defendant []." *B. Inc. v Miller Brewing Co.,* 663 F.2d at *554.* See also, *Dodson v. Spihada Maritime Corp.,* 951 F.2d at 42-43, quoting other sources. If that prediction cannot be made "a good faith assertion

of such an expectancy in a state court is not a sham... and is not fraudulent in fact or in law." *B. , Inc,* 663 F.2d at *550* (quoting Brown, CJ in *Bobby Jones Garden Apts* 391 F.2d at 177).

In this case, the facts, as alleged and reasonably inferred, in the light most favorable to the plaintiffs are as follows. On December 12, 1992, the plaintiffs' minor children and others attended a quinceanera to celebrate the 15th birthday of a young woman hosted by her parents for their daughter and 150 of her friends at Houston's Magnolia Civic Center which they rented from the city. The City of Houston contracted for security for the event with Wells Fargo Guard Services. The security company assigned its employee, Sonja Sosa, a trained, licensed security guard equipped with uniform, badge and a 357 magnum, to provide security at the party. In her deposition, Sosa admitted that she was aware that minors were drinking alcohol inside the center and in the parking lot during the quinceanera. She stopped some of the minors from drinking by taking away their beer. At one point she threatened to shut the party down by calling the Houston Police Department. However, she allowed most of the minors who were drinking to continue to consume beer and did not call the police. A few hours after they left the party in one of the minors' car, five of the children were killed in a one automobile accident. The driver was one of the minors who had been drinking at the party. Although the facts are in dispute as to how much the deceased minors drank at the party or afterwards, autopsy reports of record indicate that they all had high blood alcohol contents at the time of the accident. An investigation report of the Texas Alcoholic Beverage Commission indicated that the partying minors were allowed to buy and consume beer on the premises

and that the host parents were allowed to serve kegs of beer at the party.

Sosa's security guard background included training at a two week school where she learned how to handle a police baton, how to carry, handle, shoot, and when to use hand weapons, and other "dos and don'ts" of basic security. As a result of that training Sosa was issued a certificate by the training center commissioning her as a security guard and giving her the right to carry firearms.

She stated in her deposition that her job the evening of the party was to protect the premises from damage, and to report any "violation of the law" that she observed to the city administrator atthe facility. In her log, written by her at intervals during the party, she stated twice that her authority included calling the Houston Police Department if the "problem" with underage beer drinking was not controlled. In her deposition she stated it was her duty to follow written orders posted at the site, but at the time the deposition was taken, she could not recall if the orders said anything about the consumption of alcohol. However, the City of Houston Manual of Policies and Procedures mandates that "The serving of alcoholic beverages is not allowed" at the subject facility. Affidavits of minor and adult guests at the party stated that Sosa observed and knew minors were drinking at the party and on the premises.

Resolving any uncertainties of state law in Plaintiffs' favor, it can be inferred reasonably that Sosa's job, as a commissioned, uniformed, badged, security guard, trained to use and carrying a 357 magnum gun, who was hired by the City of Houston for security purposes at the public facility, included enforcement of

state laws and city ordinances during the activities at the Magnolia Center. Sections 106.05, and 106.06 of the Texas Alcoholic Beverage Code states that it is illegal for minors to be served or to consume alcoholic beverages. Houston's manual of policies and procedures for its civic center and other centers prohibits serving alcoholic beverages on the premises..

Applying the principles set forth in *B., Inc.; Amerada Hess ; Bobby Jones;* and *Dodson* to the present case, it is clear that the district court erred in concluding that the defendants had borne their heavy burden of proving "fraudulent joinder." First, the district committed error in placing the burden of persuasion on the wrong party. That court ruled that the plaintiffs must "give me a case that says that a person who has been hired as a security guard has the responsibility for making sure at a party that no minors drink. that is a recognizable cause of action in the state of Texas." Thus, the district court applied a rule that is the obverse of the Fifth Circuit's precedents with regard to "fraudulent joinder" to defeat diversity. Instead, the district court should have followed our cases that require the defendants to cite a case or law that would enable a federal court to "predict with absolutecertainty that a Texas court would summarily dismiss" the cause of action against the pertinent defendant *B. Inc.,* 663 F.2d at *550.* Consequently, the district court would have been more correct to require the defendants to "give me a case that a security guard has no responsibility to control illegal, under age drinking or to take any precautions to abate the risks created by minority drunkenness during a party on city property and drunken driving afterwards." Second, the district court also erred when it "pretried" the proximate cause issue on the merits, by finding "[i]n

this case, this injury occurred four hours after they had left the party there."

There is no Texas case or law which makes it possible for any federal court to predict with absolute certainty that a Texas court would summarily dismiss the cause of action asserted against the defendant security guard Soja Quite to the contrary, (1) there are Texas cases which reasonably could be extended by analogy to afford a common law cause of action against an armed, badged and uniformed security guard for foreseeable harm caused by her negligent failure to control illegal underage drinking and evident drunkenness at a public facility where she is assigned to maintain order and safety; (2) there are Texas cases, laws and ordinances which easily could be applied to impose a duty upon a security guard as a municipality's custodian and delegate to maintain order and safety at a city recreational facility during its rental to private persons, thus affording persons injured proximately by the guard's derelictions a negligent per se cause of action; and, (3) there are Texas cases that may support a contractual liability theory against Sosa.

The following cases could reasonably be extended by analogy to afford the plaintiffs a common law cause of action against Sosa: *Otis Engineering Corporation V. Clark,* 668 S.W.2d 307 (Tex. 1983)(Plaintiffs-husbands had wrongful death actions against a defendant employer who allowed its employee to leave work in a drunken condition and cause the fatal accident thirty minutes later, some three miles away from the plant, although the employee was not in the course of his employment at the time of the mishap. The court adopted Restatement (Second) of Torts, Section 319, that recognizes a duty for

an employer to be one of a reasonably prudent employer under the same or Similar circumstances to prevent an incapacitated employee, under control of the employer, from causing an unreasonable risk of harm to others and stated further that "[s]uch a duty may be analogized to cases in which a defendant can exercise some measure of reasonable control over a dangerous person when there is a recognizable great danger of harm to third persons," [and that] "changing social conditions lead to the recognition of new duties. No better statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize and agree it exists" Id. at 310); *El Chico Corporation V. Evans,* 732 S.W.2d 306, (Tex. 1 987)(holding that an alcoholic beverage licensee owes a common law duty to the general public not to serve alcoholic beverages to a person when the licensee knows or should know that the patron is intoxicated, and the licensee who violates that duty is negligent as a matter of law.); *Berly V. D & LSecurities and Investigations, Inc.,* 876 S.W.2d 179 (Tex. App. 1994)(recognizing the common law duty of a security guard to take affirmative action to control or avoid increasing the danger from another's conduct that the security guard has at least partially created, holding that evidence raised a material issue of fact as to whether the store employee's death was reasonably foreseeable, whether the security guard failed to use proper procedures in stopping, searching, and handcuffing the shoplifter, and whether the shooting would not have taken place but for any such failure.)

Sosa's allowance of alcoholic beverages to be served to minors on city property in violation of Texas law and city ordinances was arguably negligence per se under Texas law. *Ryan V. Friesenhahn,* 911 S.W.2d 113

(Tex.App. 1995) (holding that a cause of action existed against the hosts-defendants who invited and then served a minor alcoholic beverages on the defendants' property. Later that night the minor was killed in an auto accident. The court found that allowing the deceased, a minor, to become intoxicated, in direct violation with the Texas Alcoholic Beverage Cod 106.06 was negligence per se because fatally injured party was among the class of persons the statute protects.)

The contract by which Wells Fargo agreed to provide security at the party is not of record, but since it is the heavy burden of the defendant to prove fraudulent joinder for the purpose of demonstrating that there is federal jurisdiction in this case, it should be presumed or inferred for purposes of deciding this discrete threshold issue that the contract is susceptible to the interpretation that Wells Fargo agreed to maintain safety and order by having its security guard enforce laws and ordinances against alcohol consumption on the premises and against providing alcoholic beverages to minors. Accordingly, Texas case law may support finding a duty imposed on Ms. Sosa arising from the contract that existed between the Wells Fargo and the City to provide security for the *company: Nixon V. Property Management Company,* 690 S.W.2d *546* (Tex. 1985) (where the Texas Supreme Court found that the trier of fact must determine whether the apartment management company, contracted to manage the apartment complex and as such charged with a duty to deter crime by keeping vacant apartment windows and doors secured, violated a Dallas City Ordinance on minimum standards for landowners, without a valid excuse, and thus would be per se negligent; *Midriff v. Haines,* 866 S.W.2d 328(Tex.App. 1993) (finding there was a genuine issue of material fact in determining the

duty of a defendant security company that contracted to provide security for a shopping center, because such a defendant has a duty to prevent criminal acts of third persons where the criminal conduct is the foreseeable or where it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured.); *Barefield V. City of Houston,* 846 S.W.2d 399 (Tex.App. 1992) (inferring that a security firm contracted to provide security services during a concert has a duty to protect concert goers on the leased against criminal acts of third persons).

Finally, there are cases from other states directly holding a security guard liable for not preventing minors from drinking that we cannot predict with certainty would not be applied by analogy by the Texas courts to bar dismissal of the plaintiffs' causes of action against the defendant Sosa: *e.g., Kramer V. Continental Casualty Company,* 641 So.2d 557 (La.App. 3rd Cir. 1 994)(holding security guards of a hotel had a duty to prevent underage alcoholic consumption by hotel guests and were liable for the wrongful death of a minor who consumed alcohol at the motel and was later killed in a traffic accident); *Professional Sports, Inc. V. Gilleae Security, Inc.,*766 P.2d 91 (Az. App.Div 1, Dep.A 1989) holding the security company had a duty arising out of its contract to protect third party patrons of the ball park, including underage drinking patrons).

In *B., Inc,* Judge Goldberg, with Judges Brown and Ainsworth joining, said that in treating the issue of "fraudulent joinder" we would do well to recall certain jurisdictional fundamentals:

"It is axiomatic that the jurisdiction of the federal courts is limited, with its scope defined by the Constitution and by statute. Where a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect Thus the trial court must be certain of its jurisdiction before embarking upon a safari in search of a judgment on the merits.

Because the establishment of a basis for the exercise of subject matter jurisdiction is the sine qua non of federal litigation, we have consistently held that it is the party who urges jurisdiction upon the court who must always bear the burden of demonstrating that the case is one which is properly before the federal tribunal. Applying this well established principle to matters similar to the case at bar, we find that where an out-of state defendant removes an action from state to federal court, the burden is upon the removing party to plead a basis for jurisdiction. Similarly, where there have been allegations of "fraudulent joinder," it is clear that the burden is upon the removing party to prove the alleged "fraud." *Id at 548-549.*

"When confronted with allegations of fraudulent joinder, the trial court's vision must be synoptic rather that microscopic. The court must take care not to focus solely upon the factual minutiae of the individual case and thereby lose sight of the important questions offederal jurisdiction presented when the propriety of removal is contested.

"The federal judiciary is now seen in some quarters as an ever growing monolith. It behooves those of us in federal tribunals to be certain of our jurisdictional underpinnings before we embark upon a full scale trial, and we should constantly remind ourselves that we must not trespass upon the judicial "turf' of the state courts. Many commentators have suggested that diversity is a judicial farce, but for now it remains a judicial fact. If there is complete diversity between the adverse parties, the defendant is entitled to a federal forum; but, if the plaintiff and even one properly joined defendant are residents of the same state, the federal court has no business taking jurisdiction over the action." Id at 554. (citations omitted)

In my opinion, the district court erred in determining that it had jurisdiction to try this case. The defendant did not carry its heavy burden to show fraudulent joinder. The district court and this court cannot predict with absolute certainty that a Texas court would summarily dismiss the causes of action asserted against the defendant Sosa. If we approve the district court's decision we, in effect, will have allowed the district court to overrule and turn upside down this court's carefully crafted precedents governing the proof of fraudulent joinder for the sole purpose of defeating a federal court's diversity jurisdiction. Instead, we will encourage district courts to follow an obverse rule, i.e., that anytime an in-state plaintiff sues an out-of-state employer alleging that the employer is vicariously liable for the negligence of its in-state employee, the plaintiff has the burden of showing there is a state case factually on all fours in his favor in order to avoid removal and trial of

his state cause of action by the federal courts. I believe that such a rule is statutorily unwarranted and therefore an unconstitutional expansion of the federal courts' limited diversity jurisdiction. I dissent from this Court's decision to deny the plaintiffs' the requested relief - to reverse the district court's ruling and cause this state wrongful death action to be remanded to the state court.